IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1740

MORRIS E. PHILLIPS, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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KIRSCHNER & GREENBERG, on behalf of MORRIS PHILLIPS, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported at ___ F.2d ___ (9th Cir. Nos. 77-1243/77-1428, May 11, 1978).

JURISDICTION

The judgment of the District Court (CT 389)[1] was entered on January 19, 1977. A timely petition for judgment of acquittal and/or a new trial was denied on December 9, 1976 (CT B-2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a Court may rule that portions of a taped conversation cannot be admitted under Rule 106, F.R.Ev. (requiring the introduction of "complete" statements) without in fact listening to the evidence, and whether such a ruling denies a defendant due process?

2. Whether the requisite effect on interstate commerce is satisfied under the Hobbs Act (18 U.S.C. § 1951) where the specific effect in question already exists independent of defendant's activities?

3. Whether the failure of the proof at trial to conform to the charge of the indictment in this case led to a fatal variance?

1/ All references to the Clerk's Transcript will hereafter be referred to as CT.

STATUTE INVOLVED

The Hobbs Act, 18 U.S.C. § 1951, provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section --
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, Phillips was convicted under an indictment (CT 1 through 5) charging him in Count 1 with conspiring to interfere with commerce by extortion in violation of 18 U.S.C. § 1951, and in Count 2 with principal to a crime [sic], and aiding and abetting in violation of

18 U.S.C. § 1951 and 18 U.S.C. § 2. Phillips was sentenced to serve concurrent sentences of three years on each of two counts, and to pay a fine of $10,000 with respect to Count 2. The Court of Appeals affirmed (Appendix A, infra).

1. The evidence at trial showed that in 1970 Chester Smith subcontracted with a private contractor, C.E.M.E. Development Corporation (CEME), to perform earth moving services in the San Francisco Hunter's Point area. CEME was the principal contractor for the San Francisco Redevelopment Agency (RDA), the Governmental agency responsible for the development in the City and County of San Francisco. A dispute arose which resulted from Smith being unable to obtain payment in full from CEME (RT 27-28). Although Smith was a subcontractor to CEME, he nevertheless sought to settle his claim independently in early 1973 (RT 29). Smith may have filed a suit against the RDA and CEME (RT 30).

Smith had several conversations with Phillips, who was Area Director of the RDA for Hunter's Point late in 1975, wherein Phillips promised to see if he could

expedite Smith's claim. In March of 1976, James Beasley, Chairman of the Citizen's Committee of the Model Cities Program, and an influential member of the Hunter's Point community, approached Smith and proposed to get Smith's claim settled for an illicit $67,000 kickback (RT 81). Beasley stated to Smith that he represented various RDA board members and Phillips, and that Phillips would "guarantee transaction". Beasley met Smith several times in 1976, attempting to negotiate the kickback scheme (RT 116, 117, 198, 201-202, 211-212). On June 21, 1976, Smith taped a telephone conversation with Phillips on a miniature recorder provided to him by the FBI, wherein Phillips told him that his claim would be settled in the near future since some of the RDA board members would be meeting soon (RT 216). On June 29, 1976, Smith called Phillips and explained that he did not want to give any money to Beasley because he did not trust him. On July 7, 1976, Beasley again visited Smith, demanding money. Smith called Phillips and arranged to meet him for lunch the next day (RT 242). On July 8, 1976,

Smith received a phone call from Beasley advising that Phillips would meet Smith for lunch (RT 301). Upon his arrival Smith was met by Beasley who advised that Phillips would arrive soon. Phillips arrived and Smith testified that he then offered $5,000 directly to Phillips, that Phillips insisted he should give it to Beasley (RT 305). Beasley later met Smith at a Safeway market, gave him the $5,000 and was immediately arrested. Phillips was subsequently arrested.

2. On appeal, Phillips raised, among others, the following arguments of error:

(a) That the District Court erred in refusing to allow the tapes of conversations between Smith and appellant to be played in full, pursuant to Rule 106, F.R.Ev.

(b) That the Government failed to prove that Phillips' actions had the requisite effect on interstate commerce required under the Hobbs Act, as in fact the "probable effect" on interstate commerce -- i.e., the denial of Smith's claim -- had already occurred through the RDA's decision to litigate Smith's claim.

(c) That the conviction of Phillips was based upon facts not alleged in the indictment. The indictment charged that Phillips would use his power and influence to "impede and obstruct payment of Smith's claim". However, the testimony regarding the alleged Beasley-Phillips extortion attempt contemplated only the early settlement of Smith's claim and in no way implied a threat to impede or obstruct a settlement.

The Court of Appeals nevertheless affirmed the judgment, holding that (a) The ruling by the District Court to exclude the remaining portions of the tapes, without listening to them, was within its discretion since "Phillips argued the general relevance of the tape without specifying portions or passages." (b) The requisite effect on interstate commerce under the Hobbs Act was satisfied since only a de minimus effect is necessary (United States v. Shackelford, 494 F.2d 67, 75 (9th Cir. 1974), cert. den. 417 U.S. 934 [1974]), and the effect need only be probable or potential, United States v. Staszcuk, 517 F.2d 53 (7th Cir. 1975) (en banc), cert.

den. 423 U.S. 837 (1974). (c) Phillips' failure to support Smith's claim in effect "impeded" that claim, or in any case that Phillips' actions "affected" interstate commerce and thus, even assuming there to be a variance in the indictment, Phillips, rights were not substantially prejudiced.

REASONS FOR GRANTING THE WRIT

First, the Court of Appeals holding in this case, allowing the judge to exclude the remaining portions of statements under Rule 106, F.R.Ev., without listening to them, sanctions potentially serious constitutional violations to the exercise of "discretion" under Rule 106, and cannot be allowed to stand.

Secondly, the Court of Appeals holding drastically expands the requirement under the Hobbs Act (18 U.S.C. § 1951) -- that required actions "affect interstate commerce" -- to include situations where actions independent of those of the defendant have already resulted in the requisite affect on interstate commerce, and thus the defendant's actions are

superfluous.

Finally, the testimony at trial indicated that Phillips never threatened or attempted to "impede or obstruct" payment of Smith's claim as alleged in the indictment. Inasmuch as the evidence indicated Phillips' actions could not have affected Smith's claim, the Court of Appeals holding that the variance in the indictment was harmless to Phillips case cannot stand.

1. Rule 106, F.R.Ev. provides:

> "When a writing or a recorded statement or a part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." (Emphasis added)

The "rule of completeness" is subject to the qualification that the remaining portions of the proffered evidence be "relevant" (United States v. Littwin, 338 F.2d 141, 145-146 [6th Cir. 1964], cert. den. 380 U.S. 911 [1964]). Defense counsel in this case submitted numerous requests that the tapes offered in evidence

by the Government be played in their entirety (CT 270, RT 418-24, 476, 482, 488, 958-959, 968, 981, 988, 1033). The defense argued that the remaining portions of the tapes were relevant to (1) Smith's state of mind, (2) Smith's credibility, (3) Phillips' state of mind with regard to his intent, and (4) to remove undue emphasis from the previously played portions created by the "out of context" segments selected by the Government (RT 418, 475, 477-78, 958-959, 1033). The relevance of these remaining portions were thus squarely argued before the Court, yet the trial court ruled them irrelevant and refused to admit them without listening to the remaining portions of the tapes.

In affirming the trial court's holding, the Court of Appeals stated, "The record shows Phillips argued the general relevance of the tapes without specifying portions or passages. Given this failure, the District Court's ruling was within its discretion." While Phillips acknowledges that Rule 106 rulings involve the exercise of judicial discretion (United States v. Littwin, supra, at 146), it is nevertheless submitted that

a ruling under Rule 106 that remaining portions of a conversation are irrelevant, in the face of contrary argument, without listening to these remaining portions, constitutes a blatant denial of due process under the Fifth Amendment; Phillips was, at the very least, entitled to the benefit of an enlightened ruling upon the admissibility of this evidence. The Court of Appeals opinion fails to confront this issue, and thus must be considered to sanction "blind" decisions as to the relevance of remaining or related statements under Rule 106. It is submitted that such a ruling cloaks a judge with constitutionally impermissible discretion under this important federal statute.

2. In order to satisfy the jurisdictional requirement necessary to sustain a conviction under the Hobbs Act, the Government must prove that the alleged activity had at least a probable impact on interstate commerce (United States v. Shackelford, 494 F.2d 67, 75 [9th Cir.], cert. den. 417 U.S. 734 [1974]). As the Court of Appeals noted, only a de minimus

effect is necessary (id), and the effect need only be potential, not actual (United States v. Staszcuk, 517 F.2d 53, [7th Cir. 1975] [en banc], cert. den. 423 U.S. 837 [1974]).

With respect to appellant Phillips, the Government had to prove that his activities, i.e. the alleged obstruction of Smith's claim -- had at least a probable effect on interstate commerce. However, the delay of the awarding of Smith's claim was caused by the RDA board's legitimate actions, independent of the acts of Phillips (RT 745, 758, 765-767). Thus, the alleged probable effect on interstate commerce existed independently of Phillips' alleged activities. Since the specific effect on interstate commerce in question already existed, and Phillips actions were merely superfluous, his actions must be considered to be outside the scope of the Hobbs Act. The Court of Appeals opinion, which holds otherwise, stands for the proposition that an accused's actions are within the jurisdiction of the Hobbs Act, even if his actions add absolutely nothing to a preexisting

transactions effect on interstate commerce. Such a holding unjustifiably expands the potential class of defendants under the Hobbs Act drastically and cannot be allowed to stand.

3. The indictment charged Phillips with threatening to "impede and obstruct payment of Smith's claim." These allegations were not proved at trial. As the Court of Appeals noted in its opinion, Phillips never "threatened nor apparently intended to actively obstruct the claim." The court went on, however, to state that it was unnecessary since Phillips' "failure to support the claim amounted to an effective killing of it." The evidence, however, simply does not support this conclusion of the Court of Appeals.

The decision to litigate, rather than to settle Smith's claim was chosen by the RDA board for reasons thought to be in its own best interests (RT 736, 745, 754, 763-64, 772). Phillips, in fact, had no power to influence the board one way or the other (RT 663). Thus the proof at trial failed to correspond to the material

allegations of the indictment -- that Phillips obstructed Smith's claim. It is submitted that this constituted a variance fatal to the Government's case under Stirone v. United States, 361 U.S. 212, 216-217 (1960). The Court of Appeals, however, alternatively stated in its opinion that even assuming a variance in the indictment, there is no prejudice since Phillips could have been indicted for "affecting" interstate commerce by his threats. As already noted above, however, it was the RDA board, not Phillips, which had the power, if any, to impede Smith's claim, and thus "affect" interstate commerce. Phillips could not have been convicted under this alternative language and the variance was prejudicial, mandating an acquittal.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

KIRSCHNER & GREENBERG

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAY 11 1973
EMIL E. MELFI, JR.
CLERK, U.S.COURT
OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MORRIS PHILLIPS and JAMES BEASLEY, Defendants-Appellants.	)

O P I N I O N

No. 77-1283
No. 77-1428

Appeal from the
United States District Court
Northern District of California

Before: CARTER and TRASK, Circuit Judges, and BURNS,* District Judge.

CARTER, Circuit Judge:

This is a joint appeal by Morris Phillips and James Beasley, who were convicted of conspiracy to commit extortion,

* Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

in violation of the Hobbs Act (18 U.S.C. § 1951) (Count I), and of attempting to commit extortion, also in violation of the Hobbs Act (Count II). Phillips was sentenced to concurrent three-year terms and fined $10,000.00. Beasley was sentenced to concurrent five-year terms.

ISSUES

Appellants raise on appeal the following issues:

(1) Both appellants question whether their conduct falls within the ambit of the Hobbs Act;

Phillips contends:

(2) That the indictment improperly alleged the same offense in each count;

(3) That the district court abused its discretion in not requiring the tapes to be played in full;

(4) That the transcripts of the tapes were inaccurate and were not admissible;

(5) That the district court erred in permitting the introduction of a co-conspirator's statements before proof of Phillips' participation in the conspiracy;

(6) That there was a fatal variance between his indictment and the proof adduced at trial;

Beasley contends:

(7) That the district court erred in failing to order production under the Jencks Act of certain tax returns;

(8) Both appellants contend that the jury instructions were improper.

FACTS

In 1970, Chester Smith, owner of Chet Smith Trucking, subcontracted with a private contractor, CEME Development Corporation, to perform various earth moving services in the San Francisco Hunter's Point area. CEME was principal contractor for the San Francisco Redevlopment Agency ("RDA"), a governmental body responsible for urban redevelopment in the City and County of San Francisco. Smith completed his work in 1972 but could not obtain payment in full from CEME. Attempts to obtain payment were unsuccessful and in February 1973, Smith filed a claim with the RDA for $434,000.00, the amount owed

to him. The claim stagnated and in October 1973, Smith filed suit against the RDA and CEME for $1.1 million in damages.

The events which followed unfold the extortion conspiracy.[1] Smith had several meetings with Beasley, who served as Chairman of the Citizens Committee of the Model Cities Program and was known as an influential member of the Hunter's Point community. Smith also met with Phillips, who, as Area Director of the RDA for Hunter's Point, was responsible for the operation of the project. Phillips had direct access to and influence with the five-person RDA Board, the approval of which was required for payment of Smith's claim. These meetings and communications will be summarized in chronological order for clarity.

August 5, 1975

Smith met with Phillips at a San Francisco restaurant. Smith sought to

[1] The government's chief witness was Smith, who traced his meetings and conversations with appellants. Most of his conversations were taped and introduced as evidence.

influence Phillips to urge a quick settlement of his claim. Phillips told Smith he thought it was "criminal" that the RDA had refused to settle the claim. Smith informed Phillips that an RDA Board member, Joe Mosley, had attempted to solicit a $30,000.00 kickback from Smith in return for settlement of his claim. Phillips said that was a matter between Mosley and Smith.

October 1975

Another meeting took place between Smith and Phillips in which Phillips described a meeting he had with another RDA Board member, Jim Silva. Phillips assured Smith "he could handle it" and promised to talk to Silva again.

January 1976

Smith met with Phillips for lunch at a San Francisco restaurant. This meeting (and most subsequent meetings) was taped by Smith with a miniature body recorder furnished to him by the FBI. These tapes were admitted into evidence. During the meeting, Phillips told Smith that his claim would probably be settled soon and

again showed his disinterest in the alleged kickback attempt of Mosley.

January 26, 1976

Beasley came unannounced to Smith's place of business in San Francisco. Beasley said he had been sent by others to see how much it would be worth to Smith to have his claim settled. Smith said it would be worth a great deal, and Beasley said he would be in touch.

March 17, 1976

Beasley again came to Smith's offices. In a taped conversation, Beasley told Smith he was acting on behalf of Mosley, Silva, and Phillips as go-between explaining that because of his criminal record he could not be embarrassed by disclosure. He said settlement would cost $67,000.00, but encouraged a counter-offer from Smith.

April 19, 1976

During a taped conversation at Smith's office, Beasley told Smith he was going to meet Phillips to discuss the deal. Smith offered $5,000.00 down and $30,000.00 upon payment of his claim, and Beasley said

he would check with Phillips about whether this offer was acceptable.

April 26, 1976

Beasley met Smith at his office and for some still unexplained reason, offered to put up the initial $5,000.00 expected from Smith as a downpayment. Smith agreed.

April-June 1976

Smith met with Beasley several times. Beasley suggested asking CEME to pay the kickback, but Smith rejected the idea as unrealistic. Beasley instructed Smith to pay $395.00 to a third party. This amount was to be deducted from the ultimate payoff.

June 21, 1976

Smith taped a telephone conversation with Phillips. Phillips stated that Smith's claim would be settled in the near future because three of the five RDA Board members were leaving office soon and "they don't have nothing to concern themselves about." Phillips alluded to the fact that Smith should just follow directions. He told Smith he preferred not to talk to him over the telephone but within a week he

could give Smith "an omen" or "a message."

June 29, 1976

Beasley called Smith and demanded on behalf of Phillips and Commissioners Mosley, Silva and Jensen $5,000.00 in addition to that which Beasley allegedly already had paid on Smith's behalf. Later that day Phillips called Smith (indicating he wished he were calling from a pay telephone when talking to Smith) and said he understood Smith's "dilemma" and that "you're getting valid information; just do what you can about [it] and at least know where its coming from. . . ." Phillips further explained that "We got to use whatever conduit we can, irrespective of what you might think about the quality of 'em . . . ."

July 2, 1976

Beasley called Smith and again demanded the $5,000.00. He said he was serving as bagman because he had no direct connection the the RDA. He told Smith that it was worth paying the money in lieu of longer delay or possibly never receiving payment on his claim.

July 7, 1976

Beasley visited Smith and repeated his demand for the money. Beasley called Phillips' office while with Smith and asked Phillips' secretary to ask Phillips to "reassure Mr. Smith for me please." Later Smith called Phillips, who told him:

> (a) "The thing you're dealing with on the 13th or the 20th looks like the magic day . . . ."
> (b) "Well, I'm pretty much aware of everything that's being said to you on this. . . . I understand exactly how that's going. It doesn't present me with any problem. . ."
> (c) "I just said nobody will leave you hanging out."

Phillips agreed to meet Smith for lunch the following day.

July 8, 1976

Beasley called Smith in the morning and told him to tell Phillips at lunch where the payoff was to take place. Smith did not tell Beasley where he was meeting Phillips for lunch. Despite this fact, Beasley was at the restaurant when Smith

arrived and said "the man" would arrive shortly. Beasley left Smith and took a seat at the bar.

Phillips arrived and assured Smith that he was "guaranteeing the whole thing." Beasley, Phillips said, was acting only as a "messenger and a conduit." Smith offered the $5,000.00 directly to Phillips, but Phillips insisted it be given to Beasley for safety's sake. After that, Phillips said, he was going to "spend a couple of bucks for the conduit and pass it on." Smith then suggested a location for the payoff and Phillips agreed.

Smith met Beasley at the appointed time and place that afternoon. (Smith had not told Beasley about the meeting.) Smith gave the $5,000.00 to Beasley, who was immediately arrested. Phillips was arrested shortly thereafter.

Appellants were indicted by a special federal grand jury on two counts of violating the Hobbs Act, 18 U.S.C. § 1951. The indictment charged the two with participation in a scheme to extort $40,000.00 from Smith "by fear of economic loss and

under color of official right." Appellants were tried separately and found guilty on both counts.

(1) THE HOBBS ACT

The appellants' contention that their conduct is not within the scope of the Hobbs Act is without merit.

These cases were argued on August 8, 1977. At that time United States v. Culbert, 548 F.2d 1355 (9 Cir. 1977) had recently been decided, holding that "'although an activity may be within the literal language of the Hobbs Act, it must constitute "racketerring" to be within the perimeters of the Act,'" p. 1357, quoting United States v. Hokley, 542 F.2d 300, 304 (6 Cir. 1976). Following argument the present cases were submitted for decision. In October 1977 the Supreme Court granted certiorari in Culbert and on November 2, 1977, the panel vacated the submission of the present cases until the Supreme Court decided Culbert, at which time the cases would be automatically resubmitted.

On March 28, 1978, the Supreme Court reversed in United States v. Culbert, ___ U.S. ___ (1978), 46 U.S.L.W. 4259, concluding that ". . . Congress intended to make criminal all conduct within the reach of the statutory language." The Court declined "to limit the statute's scope by reference to an undefined category of conduct termed 'racketeering.'" p. 4261.

The indictment charged that Phillips and Beasley conspired "to commit extortion as . . . defined in Section 1951, Title 18, United States Code, which extortion would obstruct, delay and affect commerce . . . in that . . . defendants . . . did conspire to obtain the sum of Forty Thousand Dollars ($40,000) from Chester C. Smith with his consent, said consent to be induced by fear of economic loss and under color of official right, to wit . . . ." (Emphasis added). The pertinent parts of Section 1951 are set forth in the margin.[2]

[2] 18 U.S.C., § 1951.

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity (continued)

Thus the indictment, by charging conspiracy to commit extortion, under fear of economic loss and/or color of official

[2] (continued) in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section --

(1) The term "robbery" means....

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c). . . .

right, sets forth a classic case of violation of the Hobbs Act (18 U.S.C. § 1951) as shown by the adjudicated cases. United States v. Mazzei, 521 F.2d 639 (3 Cir. 1975), cert. denied, 423 U.S. 1014 (1975) (kickbacks to state senator from rental to state agencies); United States v. Irali, 503 F.2d 1295 (7 Cir. 1974), cert. denied, 420 U.S. 990 (1975) ($150 payoff to secure tavern license); United States v. DeMet, 486 F.2d 816 (7 Cir. 1973), cert. denied, 416 U.S. 969 (1974) (payoffs to police for not enforcing parking ordinances by owner of nightclub); United States v. Hyde, 448 F.2d 815 (5 Cir. 1971) (state attorney general and aides extorting moneys from insurance companies); United States v. Pranno, 385 F.2d 387 (7 Cir. 1967), cert. denied, 390 U.S. 944 (1968) (city officials extracting kickbacks for building permits); United States v. Furmento, 405 F. Supp. 23 (E.D. Pa. 1975) (payment to state official by cigarette dealer for not collecting state tax); and United States v. Addonizio, 313 F.Supp. 486 (D. N.J. 1970), aff'd, 451 F.2d 49 (2 Cir. 1971), cert. denied, 405 U.S. 1048 (1972) (kickbacks from contractors for city building project).

All of these cases are similar to the instant cases in that in each one a public official is engaged in extracting money from another person through the use of fear of economic loss and/or color of official right.

The requisite effect on interstate commerce is satisfied. Only a de minimis effect is necessary, United States v. Shackelford, 494 F.2d 67, 75 (9 Cir. 1974), cert. denied, 417 U.S. 934 (1974), and the effect need be only probable or potential, not actual, United States v. Staszcuk, 517 F.2d 53 (7 Cir. 1975) (en banc), cert. denied, 423 U.S. 837 (1974). Here appellants threatened the depletion of resources from a business engaged in interstate commerce. This has been consistently found an adequate jurisdictional basis. See, e.g., United States v. Merolla, 523 F.2d 51, 54 (2 Cir. 1975); United States v. DeMet, supra, 486 F.2d at 821.

(2) MULTIPLICITY OF INDICTMENT

Phillips argues that both counts of the indictment were based on the same acts. Count 1 alleged conspiracy; Count

2 charged attempted extortion. The law is settled that a violation of the Hobbs Act is a substantive offense, separable from a Hobbs Act conspiracy. United States v. Jacobs, 451 F.2d 530, 534-35, nn. 2 & 5 (5 Cir. 1971), cert. denied, 405 U.S. 955 (1972); Carbo v. United States, 214 F.2d 718, 733 n. 17 (9 Cir. 1963), cert. denied, 377 U.S. 953 (1964). The indictment was proper.

(3) PLAYING OF TAPES

Phillips contends that the district court erred in refusing to require the tapes of conversations between Smith and appellants to be played in full. Phillips recognizes that invocation of this so-called rule of completeness is subject to the requirement that the proffered evidence be relevant. See United States v. McCorkle, 511 F.2d 482, 487 (7 Cir. 1975). The record shows Phillips argued the general relevance of the tapes without specifying portions or passages. Given this failure, the district court's ruling was within its discretion.

(4) USE OF TRANSCRIPTS

Thirteen tapes of conversations were introduced during trial. Transcripts were submitted to the jury during the playing of four of these 13 tapes. Phillips now complains that these transcripts were inaccurate and hence not admissible. Phillips does not cite a single example of this purported inaccuracy, and the district court repeatedly reviewed the transcripts and found them to be accurate. Moreover, the jury was instructed that the tapes were the real evidence and that the transcripts were merely aids to their understanding. Testimony also was received from the FBI agent who prepared the transcripts verifying their accuracy. The transcripts were properly used. See United States v. Turner, 528 F.2d 143, 167-68 (9 Cir. 1975), cert. denied, 423 U.S. 996 (1976).

(5) CO-CONSPIRATOR'S STATEMENTS

Phillips argues that there was not "substantial independent evidence" other than hearsay of a Phillips-Beasley conspiracy to support the introduction of

statements from Beasley under the co-conspirator's hearsay exception. See United States v. Peterson, 549 F.2d 654, 658 (9 Cir. 1977); United States v. Calaway, 524 F.2d 609, 612 (9 Cir. 1975), cert. denied, 424 U.S. 967 (1976). In fact, Phillips' own words provide ample evidence both of the illegal conspiracy and his participation in it.

Smith's first contacts with anyone connected with the RDA were with Phillips. Shortly thereafter, Beasley came unannounced to offer Smith a deal. On June 21, Phillips told Smith to follow Beasley's directions and assured him of RDA Board approval. On July 8, Phillips met Smith at a restaurant and openly admitted his role in the plan, Beasley's role as a "messenger and a conduit," and his use of the payoff money. Moreover, Beasley knew both of the Phillips-Smith restaurant meeting and of the drop-off location -- facts revealed only to Phillips. This independent evidence proves the existence of a conspiracy and Phillips' connection with it.

Phillips also contends that the trial

court committed reversible error by permitting Beasley's statements in evidence before the existence of the conspiracy had been proven. But the procedure of provisionally admitting a co-conspirator's statements is well established. United States v. Heck, 499 F.2d 778, 790 (9 Cir. 1974); United States v. Castanon, 453 F. 2d 932, 934 (9 Cir. 1972). Phillips contention that this practice is prejudicial therefore is unavailing.

(6) VARIANCE

The indictment charged Phillips and Beasley with threatening Smith that they would "impede and obstruct payment of Smith's claim . . . unless and until Smith consented to pay $40,000 to defendants." Phillips contends that the government's proof showed only that he and Beasley promised quick settlement in return for the payoff. Cf. Stirone v. United States, 361 U.S. 212, 216-17 (1960). He thus claims there was a fatal variance between the indictment and proof.

Beasley in fact told Smith on July 2 that paying the money was better than no

settlement at all. Smith's claim had been pending with the RDA for over three years and there was no indication the RDA intended to settle. The very need to pay certain RDA Board members suggests their unwillingness to settle. It is true that Phillips never threatened nor apparently intended to actively obstruct the claim. But this was not necessary. His failure to support the claim amounted to effective killing of it. There is no requirement that there be active rather than passive conduct to constitute extortion. Cf. United States v. Hathaway, 534 F.2d 386 (1 Cir 1976) (threat to not award contract); United States v. Braasch, 505 F. 2d 139 (7 Cir. 1974) (promise of nonenforcement of local liquor ordinances).

The statute itself requires only that a defendant "affect" interstate commerce by his threats. Even if Phillips and Beasley did not "obstruct," it is certain they did "affect." In order for a variance to be fatal to an indictment, the substantial rights of a defendant must be prejudiced. Fed. R. Crim. P. 52(a); United States v. Anderson, 532 F.2d 1218,

1227 (9 Cir. 1976), cert. denied, 426 U.S. 925 (1976). Since appellants could have been convicted under this alternative working, no prejudice resulted and any variance occurring was harmless. Cf. United States v. Bolzer, ___ F.2d. ___ (9 Cir. 1977); United States v. Andrino, 501 F.2d 1273, 1278 (9 Cir. 1974).

(7) JENCKS ACT MATERIAL

Beasley claims that Smith's personal income tax returns constitute "statements" under the Jencks Act, 18 U.S.C., § 3500, and that the district court erred in refusing to order their production. Such eivdence allegedly would have proven that Smith suffered no loss of his interstate buying power.

Beasley makes no showing that the information in the tax returns related to Smith's "cash flow" position. But it is clear that the tax returns would have indicated the extent of Smith's interstate business and thus related to the government's asserted jurisdictional basis. A contrary conclusion might violate the policy of liberally construing the Jencks

Act. See Goldberg v. United States, ___ U.S. ___, 44 U.S.L.W. 4424 (March 30, 1976).

There is some doubt whether Smith's tax returns constitute "statements." Cases under the Jencks Act generally concern prior testimony, written materials, or interviews relating to the alleged offenses. In the one case where a defendant sought to produce tax returns, the court did not answer the question of whether the returns were producible, but ruled that the information contained in the returns was obtained in cross-examination anyway. See United States v. Covello, 410 F.2d 536, 545-56)2 Cir. 1969), cert. denied, 396 U.S. 879 (1969).

The real answer to Beasley's complaint is that production of the tax returns would not have served any purpose. The fact that Smith used some capital for interstate purchases is undisputed, as is the fact that appellants would have taken a sizable amount from Smith. The tax returns would not have shown how this money would have been spent. At most this evidence would have been cumulative. Thus,

Beasley suffered no prejudice from the alleged Jencks Act error. Cf. United States v. Carrasco, 537 F.2d 372, 377 (9 Cir. 1976); United States v. Phillips, 482 F.2d 1355, 1357 (9 Cir. 1973), cert. denied, 419 U.S. 847 (1974).

(8) JURY INSTRUCTIONS

Both Phillips and Beasley argue that the district court erred in refusing to instruct the jury that if they were guilty of bribery, they could not be also guilty of extortion. However, appellants were indicted for extortion both by fear of economic loss and under color of official right. The circuits are unanimous in concluding that where official right is alleged, bribery and extortion are not mutually exclusive under the Hobbs Act. See United States v. Hathaway, supra, 534 F.2d at 394; United States v. Braasch, supra, 505 F.2d at 151; United States v. Kahn, 472 F.2d 272, 278 (2 Cir. 1973), cert. denied, 411 U.S. 982 (1973).

The district court initially refused to give the government's requested instruction on coercion as a defense because

Phillips' counsel objected to its being given. Later, however, it became apparent that the jury was considering coercion as a defense for Phillips. At this point, the district court gave a supplemental instruction on coercion. Phillips claims this was error.

Phillips testified that he was "forced" and "coerced" by Beasley -- a "forceful guy" who worked through a "methodology of fear" -- to make certain statements to Smith. In addition, Phillips counsel argued coercion to the jury in his discussion of willfulness. Since "the necessity, extent, and character of additional instructions are matters within the sound discretion of the trial judge," United States v. Miller, 546 F.2d 320, 324 (9 Cir. 1976), the court could properly conclude that the evidence supported the instructions.

Phillips lastly argues that it was reversible error for the district court not to instruct the jury that conspiracy is a specific intent crime. The short answer to this is that the court did so instruct the jury. See TR., p. 1176 and E. Devitt

and C. Blackmar, Federal Jury Practice and Instructions, § 29.05 (2d ed. 1970).

The judgments of conviction are AFFIRMED.